**HOCK HUA BANK BHD.**

**v.**

**SEOK TEW KOK & ORS.**

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMED J
[CIVIL SUIT NO. 23-1092 OF 1986]
10 MARCH 1989

***CIVIL PROCEDURE:*** *Summary judgment application - Whether triable issue raised.*

***CONTRACT:*** *Guarantee - Defendants signed blank guarantee forms - Defendants given impression that 2 other parties would sign the guarantee - Defendants alleged that there was past consideration - Whether triable issues raised.*

On 28 November 1983 the 1st defendant signed a guarantee (1st guarantee) to pay on demand to the plaintiffs all money owing by Messrs Kim Liew Construction Sdn. Bhd. to the extent of RM600,000. By 25 July 1984 Kim Liew Construction Sdn. Bhd. owed the plaintiff the sum of RM483,268.07. On 10 September 1984 the defendants signed a joint and several guarantee (2nd guarantee) to pay on demand the amount owed by Kim Liew Construction Sdn. Bhd. limited to RM500,000. The plaintiffs made further advances to Kim Liew Construction Sdn. Bhd. and by 13 August 1986 the amount outstanding was RM644,880.49.

The plaintiffs applied for leave to sign final judgment against the defendants for the amount of RM644,880.49. The defendants alleged that they were given blank guarantee forms to sign and that at the time when they executed the guarantee they were under the impression that 2 other parties would jointly sign the guarantee which never materialised. They further alleged that there was no good consideration for the guarantee as the consideration was past.

**Held:**

**[1]** That the allegation that the defendants were given blank guarantee forms to sign was not contradicted by the plaintiffs in the affidavits.

**[2]** The second guarantee which on the face of it had 5 names as intended guarantors and of which 2 of the names were cancelled.

**[3]** In respect of the second guarantee in which there were 5 names as intended guarantors and of which 2 names had been cancelled the plaintiffs had to show that the other guarantors had consented to the dispensation of these 2 persons.

**[4]** That on the facts it was questionable whether there was sufficient consideration for the guarantee in view of the fact that the second guarantee was signed by the defendants after the plaintiffs had ceased to grant overdraft facilities to Kim Liew Construction Sdn. Bhd.

**[5]** It was also apparent that there had been no notice of demand made on the defendants.

**[6]** In view of all the factors, there were triable issues and the appeal would be dismissed with costs.

*[Appeal dismissed with costs.]*

**Cases referred to:**

*The National Provincial Bank v. Brackenbury [1906] 22 TLR 797*
*Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd. [1980] 1 MLJ 172*

*For the plaintiffs - Tan Jin Wah; M/s. Ong Ban Chai & Co.*
*For the defendants - Richard Tan; M/s. K.C. Yap Kamaludin & Partners*

**JUDGMENT**

**Mohd. Yusoff Mohamed J:**

This appeal from the Senior Assistant Registrar's decision in refusing to grant an O. 14 application by the plaintiffs was dismissed with costs. The matter was further argued in open Court and at the end of it I affirmed my order of dismissal. The plaintiffs now appeals further.

The facts as deposed in affidavits are these:

On 28 November 1983, the 1st defendant signed a personal guarantee (1st guarantee) to pay on demand to the plaintiffs all money owing by Messrs. Kim Liew Construction Sdn. Bhd. (Kim Liew) on an overdraft facility extended to it to the extent of RM600,000.

On that date the amount owed by Kim Liew to the plaintiffs was RM559,052.42 only.

By 16 December 1983, upon payments made by Kim Liew, the remaining amount owed to the plaintiffs was RM248,662.42. From that date the plaintiffs made further advances to Kim Liew and on 31 January 1984, the facility was terminated. By 25 July 1984, the amount owed by Kim Liew was RM483,268.07. A demand was made to Kim Liew to pay the outstanding sum.

On 10 September 1984, the three defendants signed a joint and several guarantee (2nd guarantee) to pay on demand the amount owed by Kim Liew to the plaintiffs. The sum recoverable by plaintiffs was limited to RM500,000 only. According to the plaintiffs' branch manager, in his affidavit of 26 December 1986, this guarantee was entered in consideration of the plaintiffs withholding legal proceedings against Kim Liew.

In their statement of claim filed on 25 August 1986, the plaintiffs averred that they had made more advances to Kim Liew and up to 13 August 1986, the amount outstanding was RM644,880.49. On 13 December 1986, they applied for leave to sign final judgment on this amount, on the ground that the defendants had no defence to the claim.

The probable defences raised by the defendants are these:

(a) They were given blank forms to sign and had no knowledge that those documents were guarantee agreements.

(b) The 1st defendant was under an impression that the extent of the alleged guarantee is RM300,000 and not RM600,000 as stated in the 1st guarantee document.

(c) The 1st, 2nd and 3rd defendants were led to think that 2 other persons will sign the 2nd guarantee documents but in fact they didn't.

(d) There is no good consideration given, as consideration if any at best is past and it is triable as to whether such consideration is good consideration or not.

The Senior Assistant Registrar found that there are conflicting evidence of facts raised by the parties which could only be determined at proper trial. In those circumstances she refused the plaintiffs' application. I am in agreement with her finding and dismissed the appeal.

On the allegations by the defendants that they were given blank guarantee forms to sign and the impressions they had that the guarantee would be limited to RM300,000, there seems to be no reply by the plaintiffs in their affidavits to these allegations. These are triable issues. It is not the function of the Court at that stage of the proceedings for the Senior Assistant Registrar to make a proper finding of facts on these issues.

The 2nd guarantee, on the face of it, contained five names as intended guarantors and two of them had been cancelled. This was a joint and several guarantee. In such a situation the plaintiffs must show that the other guarantors had consented to dispense with the execution of the document by those who had signed - see *The National Provincial Bank v. Brackenbury* [1906] 22 TLR 797 and s. 97, Guarantee Act 1950.

It is also alleged that the 2nd guarantee was signed by the defendants after the overdraft facilities extended to Kim Liew had ceased. That being the case, it is questionable whether there was sufficient consideration to bind the guarantors. The promise was not contemporaneous with the benefit to be derived by the principal debtor - *Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd.* [1980] 1 MLJ 172.

Assuming, however, the consideration, as contended by the plaintiffs' branch manager, was the promise by the plaintiffs to withhold legal proceedings against Kim Liew, the fact and the amount so claimed are not borne out by the statement of claim.

It is also apparent that there is no notice of demand made on the defendants when this claim was filed, which is an essential condition precedent to the contract of guarantee before any liability could arise.

Upon all these factors the appeal was dismissed with costs.

Also found at [1989] 1 CLJ 936